

STATE OF MICHIGAN
COURT OF APPEALS

FRANKLIN EYE CONSULTANTS, P.C.,

Plaintiff-Appellant,

v

DR. SUSAN MALINOWSKI,

Defendant-Appellee.

UNPUBLISHED

June 24, 2003

No. 238978

Oakland Circuit Court

LC No. 01-035052-CZ

Before: Sawyer, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

I. FACTS

Defendant was employed by plaintiff pursuant to a written contract of employment. The contract contained a covenant by defendant not to compete with plaintiff for two years following termination of her employment and provided for liquidated damages in the event of a breach, and binding arbitration of any dispute. Defendant resigned her employment in November 1999. Plaintiff ceased operations on December 31, 1999. On January 3, 2000, defendant took a position with another clinic which provided services similar to those provided by plaintiff.

Plaintiff claimed that defendant violated the covenant not to compete and the parties proceeded to arbitration. The arbitrator ruled in defendant's favor, finding that because plaintiff had ceased operations, it did not maintain a business with which defendant was in competition. Plaintiff then filed this action to vacate the award pursuant to MCR 3.602(J). The circuit court granted defendant's motion for summary disposition filed pursuant to MCR 2.116(B)(1), and dismissed the action.

II. STANDARD OF REVIEW

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). The court may vacate an arbitration award if the arbitrator exceeded his or her powers. MCR 3.602(J)(1)(c). An arbitrator exceeds her powers whenever she acts beyond the material terms of the contract from

which her authority is derived, or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996). To be reviewable, the legal error must have been so material or substantial as to have governed the award, and but for which error, the award would have been substantially different. *Rembert v Ryan's Family Steak House, Inc*, 235 Mich App 118, 164-165; 596 NW2d 208 (1999). In addition, the error must appear on the face of the award. *Smith v Motorland Ins Co*, 135 Mich App 33, 40; 352 NW2d 335 (1984). The court cannot engage in contract interpretation, which is an issue for the arbitrator to determine, or review the arbitrator's factual findings. *Konal v Forlini*, 235 Mich App 69, 74-75; 596 NW2d 630 (1999).

III. ANALYSIS

The crux of plaintiff's claim on appeal is that *Christner v. Anderson, Nietzke & Co., P.C.*, holds that a dissolved corporation may enforce a covenant not to compete against a former employee and the arbitrator exceeded his powers by declining to follow that law. *Christner v Anderson, Nietzke & Co, PC*, 156 Mich App 330; 401 NW2d 641 (1986). Although *Christner* did involve a dispute between shareholder-directors of a dissolved corporation, and the plaintiff therein did try to recover liquidated damages for the defendant shareholder-directors' violation of a covenant not to compete, neither this Court nor the Supreme Court ruled that the covenant was enforceable. Moreover, whether a defunct company could enforce a covenant not to compete against a former employee was not an issue in *Christner* and was not decided by either court. The facts of *Christner* are distinguishable from the present case and plaintiff has not cited any other applicable authority supporting its position. Our review of the record warrants the conclusion that plaintiff has not shown the arbitrator exceeded his powers by issuing a ruling contrary to controlling principles of law. Therefore, the trial court did not err in granting defendant's motion.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Bill Schuette